

The opinion in support of the decision being entered today was not written for publication and is not binding precedent of the Board.

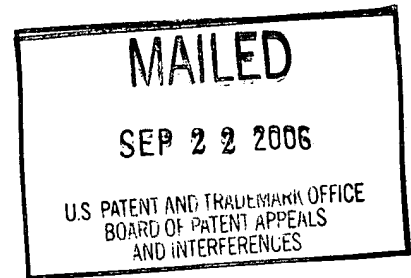
UNITED STATES PATENT AND TRADEMARK OFFICE

**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Ex parte ROBERT BARTLETT ELLIOTT, and
BRIAN MURRAY LAUGESSEN

Appeal No. 2006-2657
Application No. 10/019,506

ON BRIEF



Before ADAMS, MILLS, and GREEN, Administrative Patent Judges.

MILLS, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on appeal under 35 U.S.C. § 134 from the examiner's final rejection of claims 28-32 and 37-45.

Claim 28 reads as follows:

28. A dietary supplement comprising:
- an immunomodulating component selected from the group consisting of β -casomorphin-9 and β -casein A2, and
 - a fortifying component which is an effective amount of at least one compound capable, when consumed of reducing plasma levels of homocysteine (tHcy) in a mammal, said compound being selected from the group consisting of betaine, cobalamin, folic acid, pyridoxine, and pharmaceutically acceptable analogues thereof.

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The prior art references cited by the examiner are:

Wakat et al. (Wakat)	6,054,128	April 25, 2000
Kalvinsh et al; (Kalvinsh)	5,965,615	Oct. 12, 1999
Spireas	6,555,551	April 29, 2003

Yoshikawa et al. (Yoshikawa), "Enzymatic release of Pro-Beta-Casomorphin-9 and Beta-casomorphin-9 from Bovine Beta-Casein," Dept. of Food Science Technology, Kyoto Univ., pp. 38-42 (1994)

Grounds of Rejection

Claims 28-32 and 37-45 stand rejected under 35 U.S.C. § 103(a) over Yoshikawa in view of Wakat, Kalvish and Spireas.

We affirm this rejection.

Claim Grouping

Appellants do not argue any claims separately. Therefore, we select claims 28 as representative of the rejected claims. 37 C.F.R. § 41.37(c)(1)(vii) (September 13, 2004). See In re Dance, 160 F.3d 1339, 1340 n.2, 48 USPQ2d 1635, 1636 n.2 (Fed. Cir. 1998) (noting that dependent claims not argued separately on the merits rise or fall with the independent claim to which they relate).

DISCUSSION

Obviousness

Claims 28-32 and 37-45 stand rejected under 35 U.S.C. § 103(a) over Yoshikawa in view of Wakat, Kalvinsh and Spireas.

In rejecting claims under 35 U.S.C. § 103, the examiner bears the initial burden of presenting a prima facie case of obviousness. See In re Rijckaert, 9 F.3d 1531, 1532, 28 USPQ2d 1955, 1956 (Fed. Cir. 1993). A prima facie case of obviousness is established when the teachings from the prior art itself would appear to have suggested the claimed subject matter to a person of ordinary skill in the art. In re Bell, 991 F.2d 781, 783, 26 USPQ2d 1529, 1531 (Fed. Cir. 1993). An obviousness analysis requires that the prior art both suggest the claimed subject matter and reveal a reasonable expectation of success to one reasonably skilled in the art. In re Vaeck, 947 F.2d 488, 493, 20 USPQ2d 1438, 1442 (Fed. Cir. 1991). With this as background, we analyze the prior art applied by the examiner in the rejection of the claims on appeal.

To summarize the examiner's rejection, Yoskikawa teaches that an immunomodulating component such as beta-casomorphin-9 are inhibitors of the angiotensin converting enzyme (ACE) which is well known in the art to cause hypertension and heart failure. Spireas, likewise, teaches that ACE inhibitors are useful in the treatment of cardiovascular disorders. The examiner acknowledges that

neither Yoshikawa or Spireas teaches that the claimed fortifying compounds can treat vascular disease. Answer, page 5.

The examiner relies on Wakat for its disclosure that vitamin B6, vitamin B12 and folic acid can treat cardiovascular disorders. Id. Kalvinsh disclosure that betaine is useful for treating cardiovascular disorders such as cardiopathy. Id.

The examiner concludes that it would have been obvious to one of ordinary skill in the art to combine the cited references because, "it is prima facie obvious to combine two or more compositions each of which is taught by the prior art to be useful for the same purpose, in order to form a third composition used for the same purpose...." MPEP Section 2114.06, Answer, page 5. The examiner further concludes it would have been obvious to "modify Yoshikawa [] and Spireas's teachings of beta-casomorphin-9 for treating cardiovascular disease to include the beneficial teachings of Wakat and Kalvinsh [] that the fortifying compounds also treat cardiovascular disease because the combined teachings of combining the two claimed active ingredients of an immunomodulating component and a fortifying compound would create an improved composition to reduce the incidence of population with cardiovascular disease." Id.

We find the examiner has provided sufficient evidence to support a prima facie case of obviousness which has not been convincingly rebutted by appellants.

In response, appellants contend that Spireas teaches that ACE inhibitors are not stable and are susceptible to breakdown, teaching away from their use in the present invention. Brief, page 3. We are not persuaded by this argument. To begin, claim 28

uses the claim language "comprising", and thus claim 28 is open to additional ingredients, such as additional ingredients which stabilize ACE inhibitors described in Spireas. Further, Spireas teaches to one of ordinary skill in the art how to overcome the instability of ACE inhibitors, such as by adding metal salts, which are not precluded from the scope of claim 28.

Appellants argue that neither Wakat or Kalvinsh teach the claimed - β -casomorphin-9 and β -casein A2 or that it would provide a desirable dietary supplement. Brief, pages 3-4. However, "[n]on-obviousness cannot be established by attacking references individually where the rejection is based upon the teachings of a combination of references." In re Merck & Co., Inc., 800 F.2d 1091, 1097, 231 USPQ 375, 380 (Fed. Cir. 1986). The test of obviousness is "whether the teachings of the prior art, taken as a whole, would have made obvious the claimed invention." In re Gorman, 933 F.2d 982, 986, 18 USPQ2d 1885, 1888 (Fed. Cir. 1991). While neither Wakat or Kalvinsh teach β -casomorphin-9 and β -casein A2, they do teach the use of the claimed fortifying compounds in a dietary supplement to treat cardiovascular disease. The examiner relies on the combination of Wakat and Kalvinsh with Yoshikawa and Spireas which teach the β -casomorphin-9 and β -casein A2 are ACE inhibitors which are also particularly useful in the treatment of cardiovascular disorders.

No other arguments are put forth by appellants to rebut the examiner's prima facie case. For the reasons discussed in detail above, we conclude that the combined teachings of the cited references would have rendered the subject matter of claim 28

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prima facie obviousness to one of ordinary skill in the art, and that the prima facie case of the examiner has not been convincingly rebutted by appellants by a preponderance of the evidence.

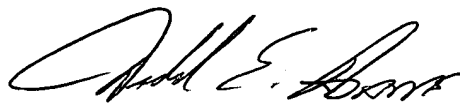
The rejection of the pending claims for obviousness over Yoshikawa in view of Wakat and Spireas is affirmed.

CONCLUSION

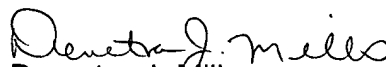
The rejection of claims 28-32 and 37-45 under 35 U.S.C. § 103(a) over Yoshikawa in view of Wakat, Kalvinsh and Spireas is affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 CFR § 1.136(a).

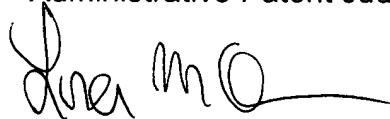
AFFIRMED



Donald E. Adams
Administrative Patent Judge



Demetra J. Mills
Administrative Patent Judge



Lora M. Green
Administrative Patent Judge

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